ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 8, 2004

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

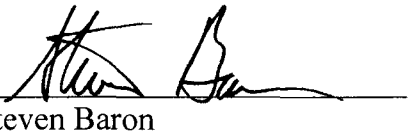
Re: WC Docket No. 04-313; CC Docket No. 01-338
In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Obligations of Incumbent Local Exchange Carriers

Dear Ms. Dortch:

The Public Utility Commission of Texas respectfully notifies the Commission of a decision issued yesterday in Sage Telecom, LP v. Public Utility Commission of Texas, Case No. A-04-CA-364-SS, United States District Court for the Western District of Texas. In its comments filed in the above-referenced dockets earlier this week, the Texas PUC advised the Commission that a decision in this court case was expected shortly.[1]

A copy of the court's decision is attached.

Respectfully submitted,



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Attachment

[1] *See* Comments of the Texas PUC on the Petitions of SBC and BellSouth Regarding the Filing Requirements of Section 252 at 8, n.16.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED
2004 SEP -7 PM 3:00

SAGE TELECOM, LP,
Plaintiff,

-vs-

Case No. A-04-CA-364-SS

PUBLIC UTILITY COMMISSION OF TEXAS,
Defendant.

ORDER

BE IT REMEMBERED that on the 10th day of September 2004, the Court called the above-styled cause for a hearing, and the parties appeared through counsel. Before the Court were Plaintiff Sage's Motion for Injunctive Relief and Motion for Summary Judgment [#15], Intervenor SBC Texas' Application for Preliminary Injunction and Motion for Summary Judgment [#16], the Competitive Local Exchange Carrier Intervenor-Defendants' Cross-Motion for Summary Judgment [#23], and Defendant Public Utility Commission of Texas's Cross-Motion for Summary Judgment [#25]. Having considered the motions and responses, the arguments of counsel at the hearing, and the applicable law, the Court now enters the following opinion and orders.

Background

This case involves a dispute between the Public Utility Commission of Texas ("the PUC") and two telecommunications companies, Southwestern Bell, Telephone, L.P. d/b/a SBC Texas ("SBC") and Sage Telecom, L.P. ("Sage") over the public filing requirements of the Telecommunications Act of 1996 ("the Act"). Pub. L. 104-104, 110 Stat. 56. SBC and Sage seek

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an injunction that would prevent the PUC from requiring them to publicly file certain provisions of an agreement under which SBC would provide Sage services and access to elements of its local telephone network. The PUC, joined by the Intervenor-Defendants, AT&T Communications of Texas, L.P., Birch Telecom of Texas, LTD, LLP, ICG Communications, nii Communications, Ltd., and Xspedius Communications, LLC, seek an order requiring SBC and Sage to publicly file the agreement in its entirety. In order to understand either party's position with respect to the public filing provisions of the Act, it is necessary to begin with a discussion of the context in which those provisions and the rest of the Act arose.

Until the time of the Act's passage, local telephone service was treated as a natural monopoly in the United States, with individual states granting franchises to local exchange carriers ("LECs"), which acted as the exclusive service providers in the regions they served. *AT&T v. Iowa Util.s Bd.*, 525 U.S. 366, 371 (1999). The 1996 Act fundamentally altered the nature of the market by restructuring the law to encourage the development and growth of competitor local exchange carriers ("CLECs"), which now compete with the incumbent local exchage carriers ("ILECs") such as SBC in the provision of local telephone services. *Id.* The Act achieved its goal of increasing market competition by imposing a number of duties upon ILECs, the most significant of which is the ILEC's duty to share its network with the CLECs. *Id.*; 47 U.S.C. § 251. Under the Act's requirements, when a CLEC seeks to gain access to the ILEC's network, it may negotiate an "interconnection agreement" directly with the ILEC, or if private negotiations fail, either party may seek arbitration by the state commission charged with regulating local telephone service, which in Texas is the PUC. § 252(a), (b). In either case, the interconnection agreement must ultimately be publicly filed with the state commission for final approval. § 252(e).

Pursuant to the Act, Sage and SBC entered into what they have referred to as a Local Wholesale Complete Agreement ("LWC"), a voluntary agreement by which SBC will provide Sage products and services subject to the requirements of the Act, as well as certain products and services not governed by either § 251 or § 252. Sage and SBC, concerned that portions of the LWC consist of trade secrets, have sought to gain the required PUC approval without the public filing of those portions of the agreement they contend are outside the scope of the Act's coverage.

On April 3, 2004, SBC and Sage issued a press release announcing the existence of their LWC agreement. Later that month, a number of CLECs filed a petition with the PUC seeking an order requiring Sage and SBC to publicly file the entire LWC. Sage and SBC urged the PUC not to require the public filing of the whole agreement, and on May 13, 2004, the PUC ordered Sage and SBC to file the entire LWC under seal, designating the portions of the agreement it deemed confidential, so the rest of it could be immediately publicly filed.

On May 27, 2004, the PUC declared the entire, unredacted LWC to be an interconnection agreement subject to the public filing requirement of the Act and ordered SBC and Sage to publicly file it by June 21, 2004. Instead of filing the agreement on that date, SBC and Sage filed suit in a Travis County district court challenging the PUC's order as exceeding the scope of its authority under the Act and alleging Texas trade secret law protected its confidential business information. The parties entered into an agreed temporary restraining order ("TRO") enjoining the PUC order as well as Sage and SBC's plans to begin operating under the agreement. The PUC removed the case to this Court on the basis of the federal question it raises with respect to the scope of the Act's coverage, and the parties subsequently agreed to extend the TRO to allow the Court time to decide

the issues raised in the case. SBC and Sage seek a preliminary as well as a permanent injunction barring the PUC from enforcing its May 27, 2004 order.

In evaluating whether the PUC's interpretation of the Telecommunications Act and the FCC's regulations are correct, this Court applies a de novo standard of review. *Southwestern Bell Tel. Co. v. Pub. Util. Comm'n of Texas*, 208 F.3d 475, 482 (5th Cir. 2000). Additionally, all parties have stipulated summary judgment is appropriate in this case because there are no genuine issues of material fact and this case may be wholly decided as a matter of law. FED. R. CIV. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–248 (1986).

Analysis

As an initial matter, the Court notes its agreement with the PUC's contention that it need not consider whether the items identified in the LWC are entitled to trade secret protection under Texas law. The PUC concedes it relies exclusively on the Act for its position the LWC must be filed in its entirety, and accordingly, were this Court to determine the PUC's interpretation of the statute was erroneous, the PUC would have no authority on which to order Sage and SBC to file the whole agreement. Likewise, SBC and Sage do not deny the obvious fact that any trade secret protections afforded by state law must give way to the requirements of federal law. Therefore, this Court's resolution of the dispute over the scope of the Act's public filing requirement entirely disposes of the case.

Section 251 establishes a number of duties on ILECs, including "[t]he duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network," § 251(c)(2); "[t]he duty to establish reciprocal compensation

arrangements for the transport and termination of telecommunications," § 251(b)(5); "[t]he duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties [described in subsections (b) and (c)]," § 251(c)(1); and "[t]he duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis," § 251(c)(3).[1]

Section 252 sets forth the procedures by which ILECs may fulfill the duties imposed by § 251. An ILEC may reach an agreement with a CLEC to fulfill its § 251 duties either through voluntary negotiations or, should negotiations fail, through arbitration before the State commission. Section 252(a)(1) describes the voluntary negotiations procedure: "Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. . . . The agreement . . . shall be submitted to the State commission under subsection (e) of this section."

Whether the agreement is reached by means of voluntary negotiations or arbitration, it "shall be submitted for approval to the State commission." § 252(e)(1). The State commission may reject an agreement reached by means of voluntary negotiations, or any portion thereof, only if it finds the agreement or any portion "discriminates against a telecommunications carrier not a party to the agreement" or "is not consistent with the public interest, convenience, and necessity." § 252(e)(2)(A). On the other hand, the State commission may reject an agreement adopted by

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[1] Only certain network elements must be provided on an unbundled basis under § 251. The statute gives the FCC the authority to promulgate regulations setting forth which unbundled network elements must be offered by the ILEC. § 251(d).

arbitration, or any portion thereof, only "if it finds that the agreement does not meet the requirements of" § 251, the regulations promulgated by the FCC pursuant to § 251, or the standards in § 252(d). § 252(e)(2)(B).

Upon approval by the State commission, the agreement must be publicly filed: "A state commission shall make a copy of each agreement approved under subsection (e) . . . available for public inspection and copying within 10 days after the agreement . . . is approved." § 252(h). The public filing requirement facilitates the fulfillment of another one of the ILEC's significant duties under the Act–to make available "any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions provided in the agreement." § 252(i).

Turning now to the facts of this case, Sage and SBC do not dispute the LWC is an agreement fulfilling at least two of SBC's duties under § 251: the duty "to establish reciprocal compensation arrangements" under (b)(5) and the duty to provide access on an unbundled basis to its local loop, which is the telephone line that runs from its central office to individual customers' premises, on an unbundled basis. *See* 47 C.F.R. § 51.319(a) (identifying the local loop as one of the unbundled network elements that must be provided under 47 U.S.C. § 251(c)(3)). In support of their position the LWC need not be filed despite the fact it clearly fulfills § 251 obligations, Sage and SBC advance two theories.

First, Sage contends the LWC need not be approved and filed because "the LWC Agreement did not result from a 'request' by Sage for regulated interconnection 'pursuant to section 251,' as required by the statute." Pl. Sage's Resp. to Cross-Mots. Summ. J. at 2 (quoting § 252 (a)(1)).

Sage's argument is essentially that § 252(a)(1) contemplates two types of voluntarily negotiated agreements in which an ILEC would provide interconnection, services, or elements pursuant to its § 251 duties: those in which the CLEC consciously invokes its right to demand the ILEC's performance of its § 251 duties and those in which it does not. There are two problems with Sage's argument.

First, there is nothing in the statute to suggest the phrase "request . . . pursuant to section 251" is meant to imply the existence of a threshold requirement, the satisfaction of which is necessary to trigger the operation of the statute. Although such a reading is not foreclosed by the somewhat ambiguous language of § 252(a)(1), other language in the statute makes clear such a triggering request is not a prerequisite for the operation of its filing and approval provisions. For instance, § 252(e)(1) states, "[a]ny interconnection agreement adopted by negotiation or arbitration shall be submitted" to the State commission for approval. Although § 252(a)(1) is linked to § 252 (e)(1) by the language in its last sentence ("The agreement . . . shall be submitted . . . under subsection (e)"), one cannot reasonably conclude the types of agreements subject to the State commission approval requirements of § 252(e)(1) are limited to agreements made pursuant to the § 252(a)(1) scheme. After all, § 252(e)(1) requires the submission not only of voluntarily negotiated § 252(a)(1) agreements, but also arbitrated § 252(b) agreements.

The second deficiency in Sage's argument is that its proposed "triggering request" requirement would allow the policy goals of the Act to be circumvented too easily. The Act's provisions serve the goal of increasing competition by creating two mechanisms for preventing discrimination by ILECs against less favored CLECs. First, the State-commission-approval requirement provides an administrative review of interconnection agreements to ensure they do not

discriminate against non-party CLECs. Second, the public-filing requirement gives CLECs an independent opportunity to resist discrimination by allowing them to get the benefit of any deal procured by a favored CLEC with a request for "any interconnection, services, or network element" under a filed interconnection agreement on the same terms and conditions as the CLEC with the agreement. § 252(e), (i). If the public filing scheme could be evaded entirely by a CLEC's election not to make a formal "request . . . pursuant to section 251," the statute would have no hope of achieving its goal of preventing discrimination against less-favored CLECs. Under Sage's interpretation of the statute, other CLECs would be able to obtain preferential treatment from ILECs with respect to § 251 services and network elements without fear the State commission or other CLECs would detect the parties' unlawful conduct. The CLEC would have to do nothing more than forego the triggering request and it would be free to enter secret negotiations over the federally regulated subject matter.[2]

Likely recognizing the problems with its contention the LWC does not trigger the filing and approval process at all, Sage retreats from this position in other parts of its briefing on these issues conceding, like SBC, that at least certain parts of the LWC must be approved and publicly filed under the Act. *See* Sage's Resp. to Cross-Mots. Summ. J. at 9; SBC's Resp. to Cross-Mots. Summ. J. at 6. Both SBC and Sage argue, however, the only portions of the LWC which must

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[2] SBC argues for a different threshold requirement, which would avoid this particular evasion problem. *See* SBC's Resp. to Cross-Mots. Summ. J. at 2. SBC contends the "interconnection agreement" referred to in § 252(e)(1) should be limited to agreements that, at least in part, address an ILEC's § 251(b) and (c) duties. *Id.* The PUC argues for a more expansive definition of the phrase, which would include all agreements for "interconnection, services, or network elements" regardless of whether the agreement provided for the fulfillment of any § 251 duties. The Court need not address this dispute, however, because the parties agree the LWC does, in fact, address at least two sets of § 251 duties–those involving "reciprocal compensation arrangements" and those involving access to SBC's local loop.

be publicly filed are those provisions specifically pertaining to SBC's § 251 duties. These arguments are ultimately unavailing.

Most importantly, SBC and Sage's position is not supported by the text of the Act itself. None of the Act's provisions suggest the filing and approval requirements apply only to select portions of an agreement reached under § 252(a) and (b). Rather, each of the Act's provisions refer only to the "agreement" itself, not to individual portions of an agreement. Section 252(e), for example, requires the submission of "[a]ny interconnection agreement" reached by negotiation or arbitration for approval by the State commission. Section 252(a)(1) provides "[t]he agreement," which is to be negotiated and entered "without regard to the standards set forth in [§ 251(b) and (c)]," shall be submitted to the State commission.

In contrast, § 252(e)(2) gives the State commission discretion to reject a voluntarily negotiated "agreement (or any portion thereof)" upon a finding that the agreement is discriminatory or is otherwise inconsistent with the public interest, convenience, and necessity. The State commission's power to reject a portion of the agreement does not suggest, however, that its review is in any way limited to certain portions of the agreement. If Congress intended the filing and approval requirements to be limited to select "portions" of an agreement, it clearly possessed the vocabulary to say so.

Alternatively, Sage and SBC argue the provisions in the LWC addressing SBC's § 251 duties are also, in fact, "agreements," which in themselves may satisfy the PUC-approval and public filing requirements. In taking this position, SBC and Sage publicly filed with the PUC an amendment to their previously existing interconnection agreement setting forth those provisions of the LWC Sage and SBC deem relevant to the requirements of § 251.

There are two problems with Sage's and SBC's position. First, § 252(e)(1) plainly requires the filing of any interconnection agreement. The fact one agreement may be entirely duplicative of a subset of another agreement's provisions does not mean only one of them has to be filed. As long as both qualify as interconnection agreements within the meaning of the Act, both must be filed. Even if the Court ruled in SBC's favor that only agreements which, at least in part, address § 251 duties are "interconnection agreements" for the purposes of § 252 (e)(1),[3] it would not change the fact the LWC is such an agreement since it addresses the same § 251 duties addressed by the publicly filed amendment.

Second, the publicly filed amendment, taken out of the context of the LWC, simply does not reflect the "interconnection agreement" actually reached by Sage and SBC. Rather, as the LWC demonstrates, the amendment is only one part of the total package that ultimately constitutes the entire agreement. Sage's Mot. Summ. J., Ex. B at ¶ 5.5 ("The Parties have concurrently negotiated an ICA amendment(s) to effectuate certain provisions of this Agreement."). The portions of the LWC covering the matters addressed in the publicly filed amendment are neither severable from nor immaterial to the rest of the LWC. As the PUC points out, the LWC's plain language demonstrates it is a completely integrated, non-severable agreement. It recites that both SBC and Sage agree and understand the following:

> 5.3.1 this Agreement, including LWC is offered as a complete, integrated, non-severable packaged offering only;
> 5.3.2 the provisions of this Agreement have been negotiated as part of an entire, indivisible agreement and integrated with each other in such a manner that each provision is material to every other provision;
> 5.3.3 that each and every term and condition, including pricing, of this Agreement is conditioned on, and in consideration for, every other term and condition, including

[3]As noted above, the Court need not reach this issue.

> pricing, in this Agreement. The Parties agree that they would not have agreed to this Agreement except for the fact that it was entered into on a 13-State basis and included the totality of terms and conditions, including pricing, listed herein[.]

Id. at ¶ 5.3.

It is clear from the excerpted material the publicly filed amendment, which itself excerpts the LWC's provisions regarding § 251 duties, is not representative of the actual agreement reached by the parties. Rather, paragraph 5.3 reveals the parties regarded every one of the LWC's terms and conditions as consideration for every other term and condition. Since, as Sage and SBC concede, some of those terms and conditions go towards the fulfillment of § 251 duties, every other term and condition in the LWC must be approved and filed under the Act. Each term and condition relates to SBC's provision of access to its local loop, for example, in the exact same way a cash price relates to a service under a simple cash-for-services contract.

That the LWC is a fully integrated agreement means each term of the entire agreement relates to the § 251 terms in more than a purely academic sense. If the parties were permitted to file for approval on only those portions of the integrated agreement they deem relevant to § 251 obligations, the disclosed terms of the filed sub-agreements might fundamentally misrepresent the negotiated understanding of what the parties agreed. For instance, during the give-and-take process of a negotiation for an integrated agreement, an ILEC might offer § 251 unbundled network elements at a higher or lower price depending on the price it obtained for providing non-§ 251 services. Similarly, the parties might agree that either of them would make a balloon payment which, although not tied to the provision of any particular service or element in the comprehensive agreement, would necessarily impact the real price allocable to any one of the elements or services under the contract.

Without access to all terms and conditions, the PUC could make no adequate determination of whether the provisions fulfilling § 251 duties are discriminatory or otherwise not in the public interest. For example, while the stated terms of a publicly filed sub-agreement might make it appear that a CLEC is getting a merely average deal from an ILEC, an undisclosed balloon payment to the CLEC might make the deal substantially superior to the deals made available to other CLECs. Lacking knowledge of the balloon payment, neither the State commission nor the other CLECs would have any hope of taking enforcement action to prevent such discrimination.

The fact a filed agreement is part of a larger integrated agreement is significant for CLECs in ways that go beyond their monitoring role. Section 252(i) explicitly gives CLECs the right to access "any interconnection, service, or network element provided under an agreement [filed and approved under § 252] upon the same terms and conditions provided in the agreement." Until recently, FCC regulations permitted a CLEC to "pick and choose" from an interconnection agreement filed and approved by the State commission "any individual interconnection, service, or network element" contained therein for inclusion in its own interconnection agreement with the ILEC. *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Second Report and Order (released July 13, 2004) at ¶ 1 & n.2.

Less than three months ago, however, the FCC reversed course and promulgated a new, all-or-nothing rule, in which "a requesting carrier may only adopt an effective interconnection agreement in its entirety, taking all rates, terms, and conditions of the adopted agreement." *Id.* at ¶ 10. Significantly, the FCC stated its decision to abandon the pick-and-choose rule was based in large part on the fact that it served as "a disincentive to give and take in interconnection agreements." *Id.* at ¶ 11. The FCC concluded "the pick-and-choose rule 'makes interconnection agreement

negotiations even more difficult and removes any incentive for ILECs to negotiate any provisions other than those necessary to implement what they are legally obligated to provide CLECs' under the Act." *Id.* at ¶ 13.

The FCC's Order demonstrates its awareness that no single term or condition of an integrated agreement can be evaluated outside the context of the entire agreement, which is why the pick-and-choose rule was an obstacle to give-and-take negotiations. In addition, the Order also demonstrates the FCC's position that an interconnection agreement available for adoption under the all-or-nothing rule may include "provisions other than those necessary to implement what [ILECs] are legally obligated to provide CLECs under the Act." The FCC, in adopting the new rule, not only proceeded on an understanding that such provisions were part of "interconnection agreements," but actively encouraged their incorporation as part of the give-and-take process.

Sage and SBC argue to require them to file their LWC in its entirety, despite the fact only a portion of it gives effect to SBC's § 251 obligations, would elevate form over substance. This contention is unfounded. Had the PUC ordered the public filing of each and every one of the LWC provisions solely on the basis they were contained together in the same document, Sage and SBC's argument might be correct. Here, however, the PUC determined all the LWC provisions were sufficiently related not by virtue of a coincidental, physical connection, but rather because of the explicit agreement reached by Sage and SBC. It was the determination of the parties themselves that each and every element of the LWC agreement was so significant that neither was willing to accept any one element without the adoption of them all.

SBC carries the form-over-substance argument one step further arguing the PUC's approach to the statute penalizes it for putting the LWC in writing and filing it. Its argument presupposes the

PUC's approach would not prohibit unfiled, under-the-table agreements that integrate filed agreements containing § 251 obligations. This argument is disingenuous. Nothing in the text of the Act's filing requirements suggests the existence of an exemption for unwritten or secret agreements and nothing about the PUC's argument implies such an exemption. Moreover, SBC and Sage did not file their LWC in its entirety until the Intervenor-Defendants in this case urged the PUC to compel its filing. That they intend to keep portions of it secret is their entire basis for filing this lawsuit. However, neither the PUC's position nor the statute itself authorizes secret, unfiled agreements and those telecommunications carriers seeking to operate under them are subject to forfeiture penalites. 47 U.S.C. § 503(b); In re *Qwest Corp., Apparent Liab. for Forfeiture,* Notice of Apparent Liab. for Forfeiture, 19 F.C.C.R. 5169 at ¶ 16 (2004).

SBC also argues a rule requiring it to make the terms of its entire LWC agreement with Sage available to all CLECs is problematic because there are certain terms contained in it, which for practical reasons, it could not possibly make available to all CLECs. Its argument proves too much. The obligation to make all the terms and conditions of an interconnection agreement to any requesting CLEC follows plainly from § 252(i) and the FCC's all-or-nothing rule interpreting it. The statute imposes the obligation for the very reason that its goal is to discourage ILECs from offering more favorable terms only to certain preferred CLECs. SBC's and Sage's appeal to the need to encourage creative deal-making in the telecommunications industry simply does not show why specialized treatment for a particular CLEC such as Sage is either necessary or appropriate in light of the Act's policy favoring nondiscrimination.

In addition to the text-based and policy arguments favoring the PUC's position that the entire LWC must be filed, the Court notes its approach is in step with FCC guidance and Fifth Circuit

caselaw. In its *Qwest Order*, although the FCC declined to create "an exhaustive, all-encompassing 'interconnection agreement' standard," it did set forth some guidelines for determining what qualifies as an "interconnection agreement" for the purposes of the filing and approval process. In re *Qwest Communications International Inc., Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, Memorandum Opinion and Order, 17 F.C.C.R. 19337 at ¶ 10. Specifically, it found "an agreement that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to section 252(a)(1)." *Id.* at ¶ 8. The FCC specifically rejected the contention "the content of interconnection agreements should be limited to the schedule of itemized charges and associated descriptions of the services to which the charges apply." *Id.*

The PUC's position also finds support in the Fifth Circuit's holding in *Coserv Ltd. Liab. Corp. v. Southwestern Bell Tel. Co.*, 350 F.3d 482 (5th Cir. 2003). There, the Fifth Circuit was asked to determine the scope of issues subject to an arbitration held by a State commission under § 252(b) of the Act. The court held, "where the parties have voluntarily included in negotiations issues other than those duties required of an ILEC by § 251(b) and (c), those issues are subject to compulsory arbitration under § 252(b)(1)." SBC and Sage argue *Coserv* is inapplicable because it did not deal with the scope of the voluntary negotiation process, under which their LWC was formed. However, the statutory scheme, viewed on the whole, does not support distinguishing *Coserv* from this case in the way they propose. As the court there noted, the entire § 252 framework contemplates non-§ 251 terms may play a role in interconnection agreements: "[b]y including an open-ended

voluntary negotiations provision in § 252(a)(1), Congress clearly contemplated that the sophisticated telecommunications carriers subject to the Act might choose to include other issues in their voluntary negotiations, and to link issues of reciprocal interconnection together under the § 252 framework." *Coserv*, 350 F.3d at 487. The arbitration provision at issue in *Coserv* is intertwined with the Act's voluntary negotiations provision since arbitration is only available after an initial request for negotiation is made. § 252(b)(1). Furthermore, because the statute makes arbitrated and negotiated agreements equally subject to the requirements for filing and commission approval, § 252(e)(1), this Court finds no basis on which to distinguish them for the purposes of determining the scope of the issues they may embrace.

SBC's concern that this reading of *Coserv* would subject any agreement between telecommunications carriers to commission approval is also unjustified. The Fifth Circuit made clear that in order to keep items off the table for arbitration–and under this Court's reading of *Coserv*, to keep them out of the filing and approval process–the ILEC need only refuse at the time of the initial request for negotiations under the Act to negotiate issues outside the scope of its § 251 duties: "An ILEC is clearly free to refuse to negotiate any issues other than those it has a duty to negotiate under the Act when a CLEC requests negotiation pursuant to §§ 251 and 252." *Id.* at 488. However, where an ILEC makes the decision to make such non-§ 251 terms not only part of the negotiations but also non-severable parts of the interconnection agreement which is ultimately negotiated, it and the CLEC with whom it makes the agreement must publicly file all such terms for approval by the State commission.

Conclusion

In accordance with the foregoing:

IT IS ORDERED that Plaintiff Sage's Motion for Injunctive Relief and Motion for Summary Judgment [#15] is DENIED;

IT IS FURTHER ORDERED that Intervenor SBC Texas' Application for Preliminary Injunction and Motion for Summary Judgment [#16] is DENIED;

IT IS FURTHER ORDERED that Defendant Public Utility Commission of Texas's Cross-Motion for Summary Judgment [#25] is GRANTED;

IT IS FURTHER ORDERED that the Competitive Local Exchange Carrier Intervenor-Defendants' Cross-Motion for Summary Judgment [#23] is GRANTED;

IT IS FURTHER ORDERED that the Temporary Restraining Order continued by this Court in the Agreed Scheduling Order of July 2, 2004 is WITHDRAWN; and

IT IS FINALLY ORDERED that all other pending motions are DISMISSED AS MOOT.[4]

SIGNED this the 7th day of October 2004.

SAM SPARKS
UNITED STATES DISTRICT JUDGE

[4]The Court declines to order SBC and Sage to publicly file the LWC. Neither the PUC nor the Intervenor-Defendants have pointed to any authority on which the Court could order such an action, and both the FCC and the PUC have sufficient enforcement authority under the Act to compel a public filing without the intervention of this Court.